



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY *MWD*

DATE: May 22, 2006

SUBJECT: COMMENT: DRAFT AO 2006-19

Transmitted herewith are two timely submitted comments regarding the above-captioned matter from the following:

Lance H. Olson, General Counsel for the California Democratic Party; and

Paul S. Ryan, Associate Legal Counsel, on behalf of the Campaign Legal Center and Democracy 21.

The proposed draft advisory opinion is being considered under an expedited process.

Attachments

Law Offices of

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May 22, 2006

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2006 MAY 22 P 3: 22

Michael E. Toner
Chairman
Federal Election Commission
999 E. Street, N.W.
Washington, D.C. 20463

Re: **Re: California Democratic Party Comments on Draft AOR 2006-19**

Dear Chairman Toner:

I am General Counsel for the California Democratic Party ("CDP"). On behalf of CDP, I submit these comments in response to the Office of General Counsel's ("OGC") Draft Advisory Opinion Request 2006-19.

CDP is an unincorporated association of approximately seven million members who have joined together to advance common political beliefs. It is the duly authorized and officially recognized Democratic Party of the State of California. Its organization, operations and functions are set out in the California Elections Code Section 7050 *et seq.* CDP is a "party committee" under Federal law pursuant to 11 C.F.R. §100.5(e)(4). As such, CDP is subject to the regulations and prohibitions of "federal election activity," as defined by the Commission.

This advice request seeks a determination as to whether proposed communications by a local party committee registered with the FEC constitute "federal election activity" as defined in 11 C.F.R. § 100.24(a)(3). Specifically, the local party committee inquires as to whether two phone scripts and one mail piece are "get-out-the-vote" ("GOTV") activity as that term is defined in 11 C.F.R. §100.24(a)(3). The communications urge Democratic voters to vote for the mayoral candidate endorsed by the local political party and state the date on which the election will be held. However, none of the proposed communications refers to any candidate for Federal office.

The draft opinion concludes that each of the three proposed communications is "federal election activity" merely because each communication refers to the date of the election. This conclusion is overbroad and inconsistent with past interpretations and statements by the Commission. For the reasons articulated below, CDP urges the Commission to conclude that the three proposed communications do not "assist" the voter merely because they include the date of the election and, therefore, are not GOTV as defined by Commission regulations.

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1. "Federal Election Activity" and "Get-Out-The-Vote" Activity

The Federal Election Campaign Act (FECA) defines "Federal Election Activity" to include get-out-the-vote activity (GOTV) and specifies that GOTV by political party committees within certain time periods must be funded with entirely Federal funds or with an allocation of Federal and Levin funds. The FEA definition was added by the Bipartisan Campaign Reform Act of 2002, but BCRA did not specify what activities would be included as GOTV. After passage of BCRA in 2002, the Commission undertook rulemaking proceedings to further define GOTV. The Commission's regulatory definition of GOTV was challenged in Federal court in *Shays v. Federal Election Commission*. As a result of that litigation, the Commission again revisited its definition of GOTV in 2005 and 2006. The revised regulatory definition became effective on March 24, 2006.

The current Commission's regulations define GOTV activity as follows:

Get-out-the-vote activity means contacting registered voters by telephone, in person or by other individualized means, to assist them in engaging in the act of voting. Get-out-the-vote activity includes, but is not limited to:

- (i) Providing to individual voters information such as the date of the election, the times when polling places are open, and the location of particular polling places; and
- (ii) Offering to transport or actually transporting voters to the polls.

11 C.F.R. § 100.24(a)(3).

Therefore, to satisfy the regulatory definition of GOTV, an activity must meet three requirements: the activity must take place during the "federal election activity" window, the activity must involve contacting registered voters by telephone, in person or by other individualized means and the activity must assist the voter in engaging in the act of voting.

2. The Proposed Communications Do No "Assist" Voters In Engaging in the Act of Voting.

The General Counsel's draft opinion concludes that the proposed activities constitute "federal election activity" because "providing the date of the election is one of the GOTV activities, regardless of whether they indicate the times when the polls are open or the voter's particular polling location." OCG Draft, p. 4, Lines 17-20. This conclusion is unfounded.

On both occasions when the Commission considered the definitions of GOTV, it recognized that defining GOTV too broadly could result in a regulatory structure that would sweep in too much non-Federal activity. The draft AOR does precisely that.

The Explanation and Justification for the 2002 rulemaking specifically contemplated that GOTV must be narrowly defined to capture only a specific category of activity. Specifically, the Commission stated it had "concluded that it must define GOTV in a manner that distinguishes the activity from ordinary or usual campaigning that a party committee may conduct on behalf of its candidates. Stated another way, *if GOTV is defined too broadly, the effect of the regulations would be to federalize a vast percentage of ordinary campaign activity.*" Federal Register, Vol. 67, No. 145, p. 49067, Monday, July 29, 2002.

After the Federal District Court's decision in *Shays v. Federal Election Commission*, the Commission again undertook rulemaking to define GOTV. During that second rulemaking, the Commission considered whether the definition of GOTV should be changed from "assisting" registered voters in the act of voting to "encouraging" registered voters in the act of voting. The *Shays* plaintiffs had argued that the "assist" definition impermissibly narrowed the definitions, by excluding activities that only "encourage" registration and voting.

However, the Commission's NPRM retained the narrower "assist" definition. According to the Commission's Explanation and Justification for the 2005-2006 rulemaking,

"[t]he purpose of retaining the 'assist' requirement is to exclude 'mere encouragement' from the scope of the rules. In proposing to retain the 'assist' requirement, the Commission was concerned that regulations *that included activities that merely encouraged people to . . . vote may sweep too broadly.*" Federal Register, Vol. 71, No. 35, p. 8928, Wednesday, February 22, 2006.

Importantly, the Commission decided to retain the original definition of GOTV "which exclude[s] mere encouragement of . . . voting from these definitions." *Id.*

Simply put, the communications at issue in the draft opinion do not "assist" registered voters in the act of voting by merely naming the date of the election. The date of the election is included in numerous campaign materials, including government publications such as the sample ballot. The mere mentioning of the date of the election in an otherwise completely non-Federal communication, should not Federalize that communication. This conclusion is supported by the plain language of the regulation and by the Commission's explanation and justification for its regulations.

3. The Conclusion Made in the Draft Opinion Is Inconsistent with Past Representations by the Commission.

CDP was one of the plaintiffs who challenged provisions of BCRA in *McConnell v. Federal Election Commission*. During that litigation, plaintiffs provided examples of communications that would become "federal" if BCRA was upheld. In defense of the legislation, the Commission informed the District Court that the mere mention of the date of the election in a non-federal

Michael E. Toner, Chairman
May 22, 2006
Page 4

communication that does not otherwise constitute federal election activity does not convert the communication into GOTV.

For example, the Commission stated in its Opposition Brief in the District Court proceedings the following:

... plaintiffs' contention that a state party committee could not use soft money to pay for the printing and mailing of a flyer that reads "Vote Republican; John Smith for Dogcatcher on November 6," [citation omitted] is entirely incorrect. The printing and mailing of the flyer would not be GOTV activity because . . . it only mentions a state candidate, it is not the type of communication that constitutes "Federal election activity" under 2. U.S.C. § 431(20)(A)(iii).

McConnell v. FEC, No. 02-0582(d.D.C. (CKK, KLH, RJL)); Redacted Opposition Brief of Defendants at 28, 31. Therefore, in considering an almost identical fact pattern, the Commission concluded that the mere reference to the date of an election would not result in GOTV activity. However, that analysis is directly opposite to the conclusion reached in the draft AOR.

For the reasons articulated above, CDP urges the Commission reject the draft AOR 2006-19 that concludes that merely referencing the date of an election in a communication which only otherwise expressly advocates the election or defeat of non-Federal candidates, constitutes GOTV activity as defined by 11 C.F.R. § 100.24(a)(3).

Thank you in advance for your consideration of these comments.

Very truly yours,

OLSON HAGEL & FISHBURN LLP



LANCE H. OLSON

LHO/EVP/sjg

cc: Commission Secretary, (202) 208-3333
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